IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 612

LEROY J. LEISHMAN,
Petitioner,

vs.

THE RICHARDS AND CONOVER COMPANY,
A CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN REPLY TO PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

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Cases Cited.

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Nothing has changed in the instant case since this Court on April 18, 1949, denied the petition for writ of certiorari by petitioner herein. Petitioner was unable in his original petition for writ of certiorari to show any basis for review by this Court under the provisions of Supreme Court Rule 38 (5b). No reason or ground for the grant of certiorari is set forth in the present petition for rehearing. In fact, nothing has changed with reference to decisions and the petitioner's position so far as a basis for granting certiorari is concerned, since this Court on February 28, 1949, denied this same petitioner a rehearing on his petition for a writ of certiorari in *Leishman* v. *Radio Con-*

denser Company and General Instrument Corporation, No. 372.

Petitioner has abandoned in his present petition his original and unsuccessful attempt to try to show a conflict between decisions (see footnote) of the Ninth Circuit and the Tenth Circuit Courts of Appeal as a basis for the granting of certiorari. As respondent showed in its original reply brief in the instant case, there is no such conflict, for the decisions are adverse to the patent in suit. The accused radio tuner structures in suit, so far as the merits of the various cases are concerned, were identical in the two cases carried through the Ninth Circuit Court of Appeals,[1, 2] and the instant case which came up through the Tenth Circuit Court of Appeals.[3] The Ninth Circuit Court of Appeals held that these structures did not infringe the patent in suit, but did not pass upon validity, and the Tenth Circuit Court of Appeals held the patent invalid for want of invention.

The present petition for rehearing narrows down simply to a more voluminous complaint by petitioner than he presented in his original petition for certiorari against alleged mechanical errors in the illustrative diagram accompanying the opinion of Judge Phillips on rehearing. The same general point argued in a few pages in petitioner's brief on his petition for certiorari, is now spread over the greater part of the thirty-nine pages in his petition for rehearing. Respondent on pages 3 and 4 of its original brief herein replied to this, and again submits that the alleged errors in immaterial mechanical details in no way affects the Ap-

1. *Leishman* v. *Associated Wholesale Electric Co.*, C. C. A. 9, 137 F. 2d 722 (also see 36 F. Supp. 804).

2. *Leishman* v. *Radio Condenser Co., and General Instrument Corp.*, C. C. A. 9, 167 F. 2d 890.

3. *Leishman* v. *Richards & Conover Co.*, C. C. A. 10, 172 F. 2d 365.

pellate Court's conclusion of want of invention and invalidity of the patent in suit. It is expected that each such petitioner to this Court does disagree with, and complain of, the decision from which he seeks to appeal. But in the instant case this in now way comes within the reasons, as set forth in Rule 38 (5b), upon which certiorari is granted.

In passing, respondent wishes to comment on one repeated reference by petitioner which may be confusing. On pages 2 to 9, inclusive, of the instant petition for rehearing, he refers in one way or another to "three decisions" or "opinions" of the Tenth Circuit Court of Appeals. There was only *one* decision on the appeal, and *one* decision on the rehearing on appeal in the Tenth Circuit Court of Appeals, the latter in no way changing the *first* decision on appeal that the patent is invalid. The original and principal decision was rendered on November 15, 1948, and the decision on rehearing was rendered January 20, 1949. The opinions are reproduced in the Record (p. 497, and p. 576), filed herein, and certified by the Clerk of the Tenth Circuit Court of Appeals under date of February 14, 1949 (R, p. 583). In the original opinion the Appellate Court held (R, p. 504):

> "that claims 8, 10, and 11 did not constitute invention over Marschalk and that all of the claims in suit were anticipated by Marschalk."

On rehearing, that Court adhered to the views expressed in its former opinion, and entered judgment remanding the cause with instructions (R, p. 582):

> "to enter a decree adjudging the claims in suit invalid for want of invention."

Respondent respectfully submits that there is no basis for a rehearing of this Court's denial on April 18, 1949,

of petitioner's original petition for writ of certiorari, and the present petition should be denied.

Respectfully submitted,

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